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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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August 27, 2018

The Honorable Chuck Grassley
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley,

I am writing to request that you release all records relating to Judge Brett Kavanaugh's employment in the Executive Branch, especially considering the importance of shedding more light on Judge Kavanaugh's concerning perspective on workers' rights. Throughout his career on the bench, Judge Kavanaugh has displayed an alarming hostility toward workers—often writing separately from his colleagues to attack workers' rights to unionize and bargain collectively with their employers.^{1,2} Judge Kavanaugh also appears willing to substitute his own ideological views for clearly expressed laws enacted by Congress.³ The publicly available documents from Judge Kavanaugh's record demonstrate a troubling hostility to workers' statutory rights, and it is critical that his still-concealed records on these matters be exposed to public scrutiny. In order to fully explore these issues and faithfully discharge our constitutional obligation to provide advice and consent on Judge Kavanaugh's nomination to the Supreme Court, I request that you provide public access to all available records relating to Judge Kavanaugh's career in government service.

I'm deeply concerned by your plans to hold hearings on Judge Kavanaugh's nomination starting on September 4. Continuing to hide available documents related to his nomination will impede the Senate from competently discharging its obligation to fully consider this nominee. Working people deserve a clear understanding of Judge Kavanaugh's views as their representatives consider giving him lifetime authority to make decisions that will significantly impact their dignity on the job and the economic security of their families.

¹ See, e.g., *Verizon New England v. NLRB*, 826 F.3d 480 (D.C. Cir. 2016); *Southern New England Telephone v. NLRB*, 793 F.3d 93 (D.C. Cir. 2015); *Venetian Casino Resort v. NLRB*, 793 F.3d 85 (D.C. Cir. 2015); *D.C. v. Dep't of Labor*, 819 F.3d 444 (D.C. Cir. 2016); *Nat'l Fedn. of Fed. Employees-IAM v. Vilsack*, 681 F.3d 483 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

² See, e.g., *NLRB v. CNN America*, 865 F.3d 740 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); *Island Architectural Woodwork v. NLRB*, 892 F.3d 362 (D.C. Cir. 2018) (Kavanaugh, J., dissenting); *Midwest Div.-MMC, LLC v. NLRB*, 867 F.3d 1288 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); *Agri Processor v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008) (Kavanaugh, J., dissenting); *SEC v. FLRA*, 568 F.3d 990, 993 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

³ See *SeaWorld of Fla. v. Perez*, 748 F.3d 1202, 1217 (D.C. Cir. 2014) (Kavanaugh, J., dissenting) ("When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves—that the risk of significant physical injury is simply too great even for eager and willing participants?"); but see *SeaWorld*, 748 F.3d at 1212-13 ("This is a question to be answered by Congress, not this court. And Congress has done so . . . Many traditional industries can be extremely dangerous to their employees . . . Yet these industries have been regulated pursuant to the [OSH Act], notwithstanding that employers could claim their employees were also 'willing participants,' 'even in the face of known physical risk,' or that the employees were taking part in 'the 'normal activities' intrinsic to the industry.'") (emphasis added).

The documents currently available to the public are wholly inadequate. Not only were they vetted by a private, partisan attorney before being released, but also they represent just two percent of Judge Kavanaugh's available White House records. There are large and important gaps in the record that we need to fill. For example, Judge Kavanaugh described his role as White House Staff Secretary as the most formative preparation he had for becoming a judge, yet none of the records from that time are expected to be released to the public. Furthermore, the full extent of records from his time with the White House Counsel's Office will not be released prior to the start of his confirmation hearings. At every step, this process fails to provide Senators and the public sufficient information or time to analyze whether Judge Kavanaugh's views and judicial philosophy are those we want represented on the Supreme Court for generations to come.

The documents in question are particularly important, because during Judge Kavanaugh's tenure at the White House, the Bush Administration took many steps to undermine workers' rights. The Bush Department of Labor issued a rule that undermined workers' right to overtime pay and notoriously under-enforced protections against wage theft.⁴ After President Bush installed a coal company executive as head of the mine safety agency, it withdrew vital mine safety rules and cut staff significantly, and several tragic mining accidents occurred during this time frame.⁵ At the National Labor Relations Board, Bush appointees eliminated nonunion workers' right to representation in workplace disciplinary interviews and weakened voluntary recognition, a procedure by which companies voluntarily agree to accept their workers' chosen union representative without forcing a contentious election process.⁶ During Judge Kavanaugh's tenure at the White House, the Bush Administration also fought against collective bargaining rights for Transportation Security Administration (TSA) agents and suspended prevailing wage protections for workers on construction projects after Hurricane Katrina.⁷

Working people and their families across the country care deeply about their rights at work and understand the federal judiciary's important role in safeguarding these hard won protections. We owe it to them to do a thorough job examining any Supreme Court nominee's record on these issues and many others—Judge Kavanaugh is no exception. In order for the Senate to understand the experiences that shaped his judicial philosophy, it is vital that you make all documents relevant to Judge Kavanaugh's record publicly available. I urge you to release the records necessary for the Senate to fulfill its constitutional duty to consider Judge Kavanaugh's nomination and to do so well in advance of any hearings that the Judiciary Committee holds on this nomination.

⁴ See Ross Eisenbrey, "Longer Hours, Less Pay: Labor Department's new rules could strip overtime protection from millions of workers," ECONOMIC POLICY INSTITUTE (July 2004) available at <https://www.epi.org/files/page/-/old/briefingpapers/152/bp152.pdf>; Government Accountability Office, GAO-09-458T, "Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low-Wage-Workers Vulnerable to Wage Theft" (2009) available at <https://www.gao.gov/assets/130/122107.pdf>.

⁵ Rep. George Miller, "The Department of Labor: A Damage Assessment," HUFFINGTON POST (Oct. 2, 2008) available at https://www.huffingtonpost.com/rep-george-miller/the-department-of-labor-a_b_122543.html.

⁶ See *Dana Corp.*, 341 NLRB No. 150 (June 7, 2004); *IBM Corp.*, 341 NLRB No. 148 (June 9, 2004).

⁷ See Mark D. Roth & Jamison F. Grella, "First Line Defenders As Second Class Citizens: Collective Bargaining Rights for TSA Employees and National Security Make Good Bedfellows," NATIONAL SECURITY LAW BRIEF (2011) available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1005&context=nsfb>; William G. Whittaker, "Davis-Bacon Suspension and its Legislative Aftermath," CONGRESSIONAL RESEARCH SERVICE (Nov. 14, 2005) available at <http://research.policyarchive.org/2624.pdf>.

Sincerely,

A handwritten signature in blue ink that reads "Patty Murray". The signature is fluid and cursive, with the first name "Patty" and last name "Murray" clearly distinguishable.

Patty Murray
Ranking Member
Committee on Health, Education, Labor and Pensions